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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

DIANNA OROZCO, Plaintiff and Appellant, v. RUSSELL F. COSER, D.D.S., INC., Defendant and Respondent.	B214292 (Los Angeles County Super. Ct. No. BC380454)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mary Thornton House, Judge. Affirmed.

The Law Offices of Craig T. Byrnes and Craig T. Byrnes for Plaintiff and Appellant.

Law Offices of Baird A. Brown and Baird A. Brown for Defendant and Respondent.

Plaintiff and appellant Dianna Orozco appeals from a judgment following an order granting summary judgment in favor of Russell F. Coser, D.D.S., Inc. (the Dental Office) in this action for pregnancy discrimination under the Fair Employment and Housing Act (the FEHA, Gov. Code, § 12940 et seq.). Orozco contends there are triable issues of fact as to whether taking X-rays was an essential function of her position as a dental assistant and whether her job should have been restructured to avoid taking X-rays as a reasonable accommodation. We conclude taking X-rays was an essential function of Orozco's job, and therefore, the Dental Office was not required to assign the X-rays to other employees. We hold that summary judgment was properly granted and affirm the judgment.

FACTS AND PROCEDURAL BACKGROUND

Allegations of the Complaint

On November 8, 2007, Orozco filed a complaint against the Dental Office for pregnancy and race discrimination, as well as failure to prevent discrimination, under Government Code section 12940.[1] Orozco is Hispanic. She worked for the Dental Office as a dental assistant. On October 30, 2007, she told the Dental Office that she was pregnant. On October 31, 2007, the Dental Office told her that she was fired due to her pregnancy. The Dental Office did not fire non-Hispanic employees who were pregnant. The Dental Office fired her because of her pregnancy and her race.

Motion for Summary Judgment and Supporting Evidence

The Dental Office filed a motion for summary judgment on the ground that Orozco could not establish an element of her discrimination claim, namely that she was

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[1] Orozco does not assert the issues of race discrimination or failure to prevent discrimination as issues on appeal. Those issues are therefore not addressed in this opinion.

able to perform her essential job duties, because taking X-rays was an essential job duty. In addition, the Dental Office did all that was required to reasonably accommodate her disability.

The Dental Office submitted Dr. Coser's declaration stating that the Dental Office had six employees at the time that Orozco was terminated. The front office employees were office manager Allison Singleton and a receptionist. They handled business concerns and patient management, are highly experienced in many areas of dentistry, and have significant organizational and computer skills. Two dental hygienists provided patient periodontal maintenance and hygiene care. They have four years of specialty training in periodontal care. The front office personnel and hygienists must pay full attention to their jobs and have little time, if any, for back office procedures, which would be an inappropriate use of their time and skill.

The back office staff consisted of two dental assistants, Orozco and a more experienced dental assistant named Cassandra Billups. Billups is responsible for the general operation of the back office and performs demanding procedures that require years of training and a measure of artistic ability. Orozco's position was typically that of an employee with little or no prior dental office experience. Orozco was responsible for operatory set-up and clean-up, general assisting, and taking the majority of the patient X-rays. The junior dental assistant typically spends between 30 and 50 percent of the job taking X-rays.

Dr. Coser listed several Hispanic women and one White woman who had worked as dental assistants for the Dental Office over the years, performed their required duties during pregnancies including X-rays, and returned to work at the Dental Office following unpaid maternity leaves of various lengths.

The Dental Office submitted Orozco's deposition testimony in which she stated that she holds a dental assisting certificate based on completion of a six-month dental assistant training program at the Southern California Regional Occupation Center in July 2007. Orozco performed an internship at the Dental Office. On August 6, 2007, the Dental Office hired her with a 90-day probationary period until November 6, 2007.

Orozco testified that she told Singleton she was pregnant on Monday. She said that because of the pregnancy, she did not think that she could take X-rays. She said that she wanted to check with her gynecologist. Asked about the basis of her statement, Orozco said, "I just wanted to make sure with my OB-GYN. There are signs everywhere, if you're pregnant, to -- the radiation, so I wasn't sure if it was okay for my baby or not." In November, after she had been terminated, Orozco asked her obstetrician about X-rays at her regularly scheduled examination. Her obstetrician said he did not think taking X-rays was a problem if she was wearing a vest, but "he wouldn't have me doing it." Orozco understood her doctor to mean that to be safe, he recommended that she not take X-rays or be near the X-ray machine. She believed him to be saying that there was some risk to the fetus.

Singleton told her it was okay and she would inform Dr. Coser and his wife. She also told Orozco that a new employee was starting work in a week to replace an employee who was terminated. The new employee would work in the front office and perform some back office X-ray work.

On October 31, 2007, Singleton met with Orozco and told her that she was being terminated based on her pregnancy. As Orozco left the room crying, Dr. Coser's wife was standing in the hallway and told her that it was not fair for other employees. Orozco understood her to mean that it was not fair to have the other employees take X-rays, when it was part of Orozco's job duties. Dr. Coser's wife said that after Orozco had the baby, she could come back and Dr. Coser's wife would find a place for her in the office. Orozco thought it was unfair that they could not keep her while she was pregnant, given her different job duties to work around the X-ray problem until she found out from her doctor whether she could take X-rays.

The Dental Office submitted Singleton's deposition testimony. Singleton stated that everyone in the office covered for Orozco for two days, but it was difficult because they had other job duties which they had to put aside to do Orozco's job. However, everyone completed their work on those days. On October 30, 2007, Singleton, Dr. Coser, and his wife met to discuss the situation. They were aware that they needed to

make accommodations for Orozco's request not to take X-rays. They concluded the staff would have to cover a heavy workload of X-rays and it was not possible for the practice. Two of the busiest days of the week, the office could have as many as 16 sets of X-rays that needed to be taken. They agreed to terminate Orozco, because they did not have any other options or any other positions to place her.

Singleton gave Orozco a letter of recommendation at the end of the meeting. The letter stated in pertinent part that Orozco had been laid off due to her inability to perform her X-ray duties due to her recent pregnancy. "Our office does not have another position in which to place her. . . . Although we are sadden[ed] by the turn of events, this is an extremely busy practice with work demands and job criteria which must be met 100 [percent] by all of its employees."

Opposition to Motion for Summary Judgment and Supporting Evidence

On November 18, 2008, Orozco opposed the motion for summary judgment on the grounds taking X-rays was not an essential function of her job and the Dental Office failed to make reasonable accommodations that were available. In addition, she argued that there were triable issues of fact concerning the causes of action for race discrimination and failure to prevent discrimination.

Orozco submitted a declaration stating that taking X-rays was only a small part of her job duties as a dental assistant. She estimated that she spent between no time and one hour per day taking X-rays.

Orozco submitted Singleton's deposition testimony in which she stated that there were seven employees working at the Dental Office, including Orozco. In addition, Dr. Coser's wife handled the accounts payable for the practice, is responsible for payroll, and does light dental assisting. His wife took X-rays many times while Orozco worked at the Dental Office. His wife took X-rays more than once and less than five times per day while Orozco worked at the Dental Office. The dental hygienists occasionally take X-rays when a patient has a problem in one area. Billups spent 30 percent of her work time

taking X-rays. Singleton believed Orozco had made a personal choice on the advice of her doctor not to take X-rays.

On October 29, 2007, Billups complained about the number of X-rays that she had to perform. She told Singleton that it was an extreme burden and made it impossible for her to make temporaries for Dr. Coser and stop what she was doing to go and take sets of X-rays, even singles, for five minutes each. Everyone finished their work, but they finished late.

Orozco submitted Dr. Coser's deposition testimony stating that when Orozco declined the offer to return, a replacement was hired. Dr. Coser testified that his wife was not licensed to take X-rays, but took X-rays under his license and supervision. He has not had any training in the prevention of pregnancy or race discrimination, nor has he provided employees with such training.

Orozco's evidence of race discrimination was that a dental hygienist who was part Asian did not take X-rays, although Orozco did not know why.

Reply, Supplement, and Trial Court Ruling

The Dental Office filed a reply on the ground that it was a small employer and did not have another position to which Orozco could be transferred and could not otherwise accommodate her except to offer to hire her back after her pregnancy.

The Dental Office submitted Singleton's declaration in which she stated that the receptionist could not take X-rays because she did not have time and was not licensed. Singleton did not have time to take X-rays and had not taken X-rays for more than ten years. The hygienists occasionally take X-rays, but they usually do not have time. They depend on the junior dental assistants to take X-rays so that they can do their jobs as hygienists. Hygienist Janet Reid-Mayse takes occasional X-rays as part of her regular job duties and was not excused from doing so during her pregnancy. Julie is not an employee of the Dental Office. She occasionally performs the work of employees of the Dental Office and took X-rays for two days when Orozco could not, but Dr. Coser's wife has

other business interests which dominate her time. Junior dental assistants take most patient X-rays, which allows senior dental assistant Billups to assist Dr. Coser with chair-side dental procedures, fabricate temporary acrylic crowns, order back office dental supplies, and restock operatories.

When Orozco did not take X-rays, Billups immediately complained because it had a severe impact on Billups's ability to perform her job. Orozco could not assume any of Billups's job duties because of her lack of experience. Orozco could not have assumed any of Singleton's job duties, the receptionist's job duties, or the hygienists' duties.

Orozco worked for the Dental Office for 51 days, some of which were not full days. During that time, Orozco took 966 X-rays, Billups took 329 X-rays, and Dr. Coser, his wife, and the hygienists took 159 X-rays.

On December 8, 2008, Orozco filed a supplemental opposition on the ground that taking X-rays was not an essential function of her job and there was a triable issue of fact as to the consequences of Orozco not performing X-rays. Orozco submitted time cards showing Billups had worked the same amount of time or less on the two days that the Dental Office had accommodated Orozco's disability than she had the week prior.

After a hearing, the trial court entered an order on January 5, 2009, granting the motion for summary judgment on the grounds that taking X-rays was an essential function of Orozco's job and the Dental Office was not required to force other employees to take over her job duties or pay the other employees overtime to complete her job. The trial court entered judgment in favor of the Dental Office that day. Orozco filed a timely notice of appeal.

DISCUSSION

Standard of Review

Summary judgment is appropriate "if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment

as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) "The moving party bears the burden to demonstrate 'that there is no triable issue of material fact and that [it] is entitled to judgment as a matter of law.' [Citation.] If the moving party makes a prima facie showing, the burden shifts to the party opposing summary judgment 'to make [its own] prima facie showing of the existence of a triable issue of material fact.' [Citation.] 'There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.' [Citation.]" (*Avila v. Continental Airlines, Inc.* (2008) 165 Cal.App.4th 1237, 1246.)

We review summary judgment orders de novo. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 860.) "We do not resolve conflicts in the evidence as if we were sitting as the trier of fact. [Citation.] Instead, we draw all reasonable inferences from the evidence in the light most favorable to the party opposing summary judgment. [Citation.] All doubts as to the propriety of granting summary judgment are resolved in favor of the opposing party. [Citation.]" (*Nadaf-Rahrov v. Neiman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, 963.)

Essential Job Function

Orozco contends that a triable issue of fact exists as to whether taking X-rays was an essential function of her job as a dental assistant. We disagree.

"Pregnancy discrimination is a form of sex discrimination under the FEHA. [Citations.]" (*Williams v. MacFrugal's Bargains Close-Outs, Inc.* (1998) 67 Cal.App.4th 479, 481-482.) Government Code section 12945 provides in pertinent part: "In addition to the provisions that govern pregnancy, childbirth, or related medical conditions in Sections 12926 and 12940, it shall be an unlawful employment practice, unless based upon a bona fide occupational qualification: [¶] . . . [¶] (b)(1) For an employer to refuse to provide reasonable accommodation for an employee for conditions related to pregnancy, childbirth, or related medical conditions, if she so requests, with the advice of

her health care provider. [¶] . . . [¶] (3) For an employer to refuse to temporarily transfer a pregnant female employee to a less strenuous or hazardous position for the duration of her pregnancy if she so requests, with the advice of her physician, where that transfer can be reasonably accommodated. However, no employer shall be required by this section to create additional employment that the employer would not otherwise have created, nor shall the employer be required to discharge any employee, transfer any employee with more seniority, or promote any employee who is not qualified to perform the job."

An employer is not liable under section 12945 for failing to accommodate a pregnant employee, if the pregnancy renders the employee unable to perform her essential duties, even with reasonable accommodation. (*Cf. Green v. State of California* (2007) 42 Cal.4th 254, 262 [an employer is not liable under § 12940, subd. (a), for discharging an employee with a disability unless the employee was able to perform the essential functions of his or her job with or without accommodation];[2] *Nadaf-Rahrov v. Neiman Marcus Group, Inc.*, *supra*, 166 Cal.App.4th at pp. 975-977 [an employer is not liable under Gov. Code, § 12940, subd. (m), for claims of failure to provide reasonable accommodation unless the work environment could have been modified or adjusted to enable the employee to perform the essential functions of his or her job].)

The essential functions of a position are "the fundamental job duties of the employment position the individual with a disability holds or desires. 'Essential functions' does not include the marginal functions of the position." (Gov. Code, § 12926,

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[2] The FEHA makes it "an unlawful employment practice, unless based upon a bona fide occupational qualification . . . [¶] . . . [f]or an employer, because of the . . . physical disability . . . of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment . . . ." (Gov. Code, § 12940, subd. (a).) An employer is not prohibited "from refusing to hire or discharging an employee with a physical . . . disability . . . where the employee, because of his or her physical . . . disability, is unable to perform his or her essential duties even with reasonable accommodations . . . ." (*Id.*, subd. (a)(1).)

subd. (f).) "A job function may be considered essential for any of several reasons, including, but not limited to, any one or more of the following: [¶] (A) . . . [T]he reason the position exists is to perform that function. [¶] (B) . . . [T]he limited number of employees available among whom the performance of that job function can be distributed. [¶] (C) . . . [T]he incumbent in the position is hired for his or her expertise or ability to perform the particular [highly specialized] function." (Gov. Code, § 12926, subd. (f)(1).)

"Evidence of whether a particular function is essential includes, but is not limited to, the following: [¶] (A) The employer's judgment as to which functions are essential. [¶] (B) Written job descriptions prepared before advertising or interviewing applicants for the job. [¶] (C) The amount of time spent on the job performing the function. [¶] (D) The consequences of not requiring the incumbent to perform the function. [¶] . . . [¶] (F) The work experiences of past incumbents in the job. [¶] (G) The current work experience of incumbents in similar jobs." (Gov. Code, § 12926, subd. (f)(2).)

Evidence that an employer or coworker made accommodations so an employee could avoid a particular task shows only that the job could be restructured, not that the function is nonessential. (*Phelps v. Optima Health, Inc.* (1st Cir. 2001) 251 F.3d 21, 26 [although coworkers allowed the plaintiff to avoid lifting more than 50 pounds, the ability to lift 50 pounds was an essential function of the plaintiff's nursing job].)[3]

The Dental Office submitted evidence showing that taking X-rays was an essential function of Orozco's job. Dr. Coser declared that the junior dental assistant takes the majority of the X-rays at the office. He also declared that taking X-rays is 30 to 50

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[3] The definition of "essential functions" under the Americans with Disabilities Act of 1990 (ADA) (42 U.S.C. § 12101 et seq.) set forth at 29 Code of Federal Regulations, part 1630.2(n) (2002) is nearly identical to the FEHA definition. "Although the Legislature has declared that FEHA is intended to be independent of, and provide greater protection than, the ADA (see [Gov. Code,] § 12926.1, subd. (a)), when, as here, provisions of the two acts are similarly worded, federal decisions interpreting the ADA are instructive in applying FEHA. [Citations.]" (*Raine v. City of Burbank* (2006) 135 Cal.App.4th 1215, 1226, fn. 7.)

percent of the junior dental assistant's work. Several employees who previously worked in the same position at the Dental Office took X-rays. Orozco had specialized training in order to take X-rays. When Orozco could no longer take X-rays, other employees and associates had to take the X-rays. In other words, the X-rays had to be performed. The Dental Office submitted sufficient evidence to shift the burden of proof to Orozco to show a triable issue of fact as to whether taking X-rays was an essential function of her job as a junior dental assistant.

In opposition, Orozco declared that taking X-rays was a small part of her job duties and she spent between no time and one hour each day taking X-rays. However, it is undisputed that during the 51 days Orozco was employed with the Dental Office, she took 966 out of the 1554 X-rays. In light of the undisputed evidence that the junior dental assistant's job duties included taking X-rays, the junior dental assistant normally took the majority of the X-rays in the office, the X-rays taken by the junior dental assistant were critical to the operation of the Dental Office, and Orozco in fact took approximately two-thirds of the X-rays during her period of employment, her evidence of the amount of time during her day that it took her to perform X-rays was not sufficient to allow a reasonable trier of fact to conclude that taking X-rays was a nonessential function of her job. The trial court correctly concluded that taking X-rays was an essential function of the job of the junior dental assistant at the Dental Office.

Reasonable Accommodation

Orozco contends the Dental Office was required to restructure her job by assigning the X-rays to another employee as a reasonable accommodation to her pregnancy. This is incorrect.

Government Code section 12926, subdivision (n), provides that "'Reasonable accommodation' may include either of the following: [¶] (1) Making existing facilities used by employees readily accessible to, and usable by, individuals with disabilities. [¶] (2) Job restructuring, part-time or modified work schedules, reassignment to a vacant

position, acquisition or modification of equipment or devices, adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities."

Job restructuring may be a reasonable accommodation, but employers are not required to exempt employees from performing essential job functions or to reallocate essential functions to other employees. (*Dark v. Curry County* (9th Cir. 2006) 451 F.3d 1078, 1089 ["The ADA does not require an employer to exempt an employee from performing essential functions or to reallocate essential functions to other employees"];[4] *Phelps v. Optima Health, Inc.*, *supra*, 251 F.3d at p. 26 [medical center was not required to allow nurse to share lifting duties with other nurses]; *Peters v. City of Mauston* (7th Cir. 2002) 311 F.3d 835, 845 [shifting responsibility to lift heavier items to coworkers is not a reasonable accommodation, if heavy lifting is an essential job requirement].)

"The obligation to reassign a disabled employee who cannot otherwise be accommodated does 'not require creating a new job, moving another employee, promoting the disabled employee, or violating another employee's rights under a collective bargaining agreement.' [Citation.]" (*Hastings v. Department of Corrections* (2003) 110 Cal.App.4th 963, 972.)

Taking X-rays was an essential function of Orozco's job as a junior dental assistant. The Dental Office was not required to exempt her from taking X-rays or reallocate the taking of X-rays to another employee. While it might have been admirable if the staff of the Dental Office had been able to assist their coworker, the Dental Office was not required by law to shift Orozco's essential job duties to her coworkers. The trial court correctly granted the motion for summary judgment.

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4 The FEHA definition of "reasonable accommodation" is virtually identical to the ADA's definition of the same term. (*Nadaf-Rahrov v. Neiman Marcus Group, Inc.*, *supra*, 166 Cal.App.4th at p. 974.) "Where a FEHA provision is modeled on an ADA provision, a federal regulation interpreting the ADA provision may be useful to guide construction of the FEHA provision. [Citation.]" (*Ibid.*)

DISPOSITION

The judgment is affirmed. Russell F. Coser, D.D.S., Inc. is awarded its costs on appeal.

KRIEGLER, J.

We concur:

ARMSTRONG, Acting P. J.

MOSK, J.